IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

NO. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 216/2002

Ali Jan — Appellant.

Vs.

State of Uttaranchal — Respondent.

Decided on 10-11-2005

A.F.R. ~~(Approved for Reporting)~~
Not Approved for Reporting

(Irshad Hussain, J.)

(B.S.Verma, J.)

Dated: 10-11-2005

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No.216 of 2002

Ali Jan S/o Sri Suleman,
R/o Village Lakhanwala,
P.S. Sahaspur, District- Dehradun. ……. Appellant.

Vs.

State of Uttaranchal …… Respondent.

Sri T.A. Khan and Sri Rajesh Joshi,
learned counsel for the appellant.
Sri A.Rab learned Addl. GA assisted by Sri S.A. Siddiqui,
learned brief holder for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma ,J.

Dated: 10-11-2005

Per: Hon'ble Irshad Hussain, J.

Accused Ali Jan has come up in appeal from his conviction and sentence to imprisonment for life and fine of Rs. 5000/-, under Section 376 of I.P.C. per Judgment and order dated 23-07-2002, passed by the then Sessions Judge, Dehradun in Sessions Trial No. 161 of 2001.

2. Briefly stated, the facts are as follows: -

P.W. 4, Km. Savitri, daughter of late Sri Chandra Bhan, resident of Nai Yamuna Colony, Dakpathar, Police Station- Vikas Nagar, District- Dehradun delivered written report, Ext. Ka.5, at P.S. Vikasnagar at 2.35 P.M. on 3-7-2001 and on its basis FIR, Ext. Ka 6 was drawn and a case under Section 376/506 of I.P.C. was registered against the accused. An entry in general diary, vide report No. 22 of the said time and date, Ext. Ka7, was also then made by the head constable Hukum Singh. Written report recited that late Sri Chandra Bhan, the father of the informant employed in the Hydel Electricity Department at Dakpathar died in harness about seven years before the incident of the case. Informant's

mother Smt. Chanda Devi was given a job in the department on the compassionate ground, Smt. Chanda Devi was remarried to accused Ali Jan, a rickshaw-puller by profession. The informant has four sisters, two of them Rekha and Rakhi were married. Smt. Chanda Devi left her home uninformed about eight days before the incident and this was the reason that in the night between 2/3-07-2001 informant, her two younger sisters, Km. Rachna (PW2) and Km. Kusum and accaused Ali Jan were the only occupants of their one small room tenement. At about 1.00 A.M. in the dead hours of the night accused Ali Jan silently picked up Km. Rachna bodily and took her to his cot. The accused, thereafter , performed indecent act (sexual intercourse) with Km. Rachna. When she raised an alarm the informant Km. Savitri and another sister Km. Kusum woke up and saw the incident. Informant also noticed that accused in order to suppress the shriek pressed the mouth of Km. Rachna. Accused also gave threats to the informant and her sisters and warned them to keep shut their mouths. The informant, however, in the morning disclosed the incident of the preceding night to her neighbor and then reached the police station to deliver the written report. It was also recited in it that Km. Rachna was experiencing pain during urination and was finding it difficult to move and walk.

3. The case against the accused having been registered investigation was taken up by S.I. Bararsi Dass Patia (PW5). Victim Km. Rachna (PW2) was sent for medical examination and the Investigating Officer after completion of the initial formalities of the investigation left for the place of the occurrence and also to effect the arrest of the accused nominated in the FIR. He was able to arrest the accused Ali Jan on 3-7-2001 itself and returned to the police station with the accused at 10. P.M. Relevant entry in the G.D. at report No. 44 of the said time and date, Ext. Ka 8 was then made and accused was detained in Hawalaat. On completion of the investigation charge sheet, Ext. Ka 10, was placed against the accused on 6-8-2001.

4- Accused pleaded innocence and stated that Smt. Chanda Devi had left for Navgaon of District- Saharanpur with Akhtar

about a week before 2-7-2001. He admitted that in the night between 2/3-07-2001, he was in the house with Km. Rachna, Km. Kusum, and Km. Savitri. He gave out that Km. Savitri was engaged to the son of Akhtar; that Akhtar used to take fruit bearing trees on contract and had been visiting his house frequently; that Akhtar developed illicit relations with his wife Smt. Chanda Devi; that he cautionaed and reprimanded his wife Smt. Chanda Devi who then fled away to village Navgaon with Akhtar; that due to this the daughters of Smt. Chanda got displeased and wanted him to leave the house so that Akhtar may be welcomed to remain in the house and that he has been falsely implicated in the case. He did not dispute that he was arrested on 3.7.2001.

5- During trial, prosecution in order to bring home guilt to the accused examined five witnesses including the victim of the alleged rape Km. Rachna (P.W.2) and her sister eye witness Smt. Savitri (P.W.4), both of whom deposed about the performance of sexual intercourse by the accused in the night of the incident. P.W.4, also proved written report of the incident as mentioned above and narrated similar version in the court. P.W.1, Dr. Manju Sachan medically examined Km. Rachna at 5 P.M. on 3.7.2001 and prepared examination report, Ext. Ka. 1 recording therein following observations:-

- Height 52" – weight- 25 kg.
- Teeth- 6+6/ 6+6
- Breast- not developed.
- Axillary and pubic hair not present.

On local examination no injury was seen.

Hymen was old torn and vagina admitted one finger. Vaginal Smear was taken and sent of histopathology. Km. Rachna was sent for x-ray examination for determination of age.

6- Medical officer prepared a supplementary report, Ext. Ka 2, after receipt of vaginal smear report and opinion of the radiologist and reported as under:-

- Vaginal smear report negative for spermatozoa and gonococci.

- According to x-ray report the age of the girl was between 12 to 14 years.
- No definite opinion about rape could be given.

7- PW3, Dr. V.K. Nautiyal was the radiologist who took x-ray of wrist, elbow, knee and ankle of Km. Rachna to ascertain the degree of fusion of the bones. He then prepared his radiological report, Ext. Ka-4 and on the basis of which the age of the girl was determined as about 11 years.

8- PW5, S.I. Banarsi Dass gave evidence to prove the steps taken during the investigation of the crime and various documents referred above including site plan, Ext. Ka-9. According to him the accused was arrested on 3-7-2001 from near Nai Colony, Dakpathar and was brought to the police Station and relevant entry was, at report No.44 in general diary, made in that regard. He gave out that Smt. Chanda Devi was not in her house for the last about eight days prior to the incident. He has not attached the bedding and clothes of Km. Rachna.

9- No evidence was adduced in defence.

10- Learned Sessions Judge placing reliance mainly on the evidence of the Km . Rachna and her sister, informant Smt. Savitri, accepted the prosecution version as true and accordingly found the accused guilty of the offence punishable under Section 376 I.P.C. Accused was thus convicted and sentenced as aforesaid. He was, however, acquitted of the charge under Section 506 I.P.C.

11- In support of the appeal, learned counsel for the accused submitted that the approach of the learned Sessions Judge was erroneous in regard to the appreciation of the evidence of the prosecution and particularly those of alleged victim Km. Rachna (PW2) and her sister informant Smt. Savitri(PW4) and that their shaky evidence without corroboration from medical evidence of the case could not have been relied upon to convict the accused. Learned counsel urged that Smt. Chanda Devi herself being a woman of dubious character and her daughters having not been brought up in the virtuous atmosphere, it was highly probable that these daughters having developed a disliking for the accused would

not have hesitated to make false and wild allegations against the accused on the mere asking of their neighbours and others who were not reconciled to the union of Smt. Chanda Devi and accused after the death of the husband of said lady and that the learned Sessions Judge also failed to take into account and in proper perspective this important aspect of the matter as emerged from the evidence on record. It was also submitted that the medical evidence in the case totally belie the claim made by the alleged victim and her sister and that in the face of the facts of the case and the evidence on record the accused could not have been held guilty of the offence of rape.

12- In response, the learned AGA persuasively argued that the definite and cogent evidence of the victim Km. Rachna was sufficient to bring home guilt to the accused even in the absence of corroboration from medical evidence and particularly when the evidence of the victim stand corroborated by the evidence of her sister informant Smt. Savitri and the admitted fact that accused slept in that very room in which the victim was sleeping during the night of the occurrence. It was thus submitted that their being no merit in this appeal, the same deserve to be dismissed.

13- On the above backdrop it has to be seen as to whether the evidence of the victim of the case Km. Rachna (PW2) and her sister informant Smt. Savitri (PW2) is cogent and reliable and prove that accused committed rape on the victim as alleged.

14- In support of the allegation that accused committed rape on Km. Rachna in the night of the occurrence there was evidence mainly of victim Km. Rachna and her sister eye witness Smt. Savitri and as stated above the learned Sessions Judge on appreciation of the evidence accepted both of them as trustworthy witnesses and opined that merely on the basis of negative medical evidence the evidence of these witnesses could not be said to be infirm and insufficient as regard the proof of the allegation was concerned. It is evident that the medical evidence in the case as referred above is negative so far as the question of commission of rape on Km. Rachna, a minor of about eleven years of age, is concerned. Km. Rachna (P.W.2) and her sister eye witness Smt.

Savitri (P.W.4) have deposed about the performance of sexual intercourse by the accused. According to them it was a case of repeated penetration of the penis in the vagina of the victim. In other words Km. Rachna was subjected to sexual intercourse in true sense of its actual performance and this was the reason that it was claimed that when accused started performing sexual intercourse Km. Rachna raised a loud shout or shriek as a result of which her sisters Smt. Savitri (P.W.4) and Km. Kushum also sleeping in the same small room were awakened and they saw the accused performing the intercourse. Km. Rachna also gave out that accused repeatedly penetrated penis in her vagina and she had experienced pain at that time. Smt. Savitri (P.W.4) also reiterated that as a result of sexual intercourse by the accused the beeeing and clothes of Km. Rachna were spoiled with blood. She however claimed that these clothes were later on washed and were not given to the police. As was pointed out by the learned counsel for the accused, on medical examination Km. Rachna, a minor girl of about 11 or 12 years, was not found to have even sustained minor laceration, inflammation, bruising, redness etc, apart from recent rupturing of the hymen and this peculiar aspect of the matter create grave suspicion and doubt in the claim of both these witnesses that accused performed sexual intercourse. The bedding and clothes of the alleged victim of rape could have been spoiled with blood only if internal and external genitals were injured and it appear that Smt. Savitri knowing it very well that rape was not committed and there was no occasion of bedding and clothes of Km. Rachna getting spoiled with blood tried to salvage the damage by stating that the bedding and clothes which were stained with blood were later on washed and these items were not given to the police.

15- Considering the nature of the case we are conscious of the fact that it is well settled that corroboration to the testimony of the victim of the sexual offence from medical evidence is not required if the evidence of the victim and other evidence in that regard is otherwise genuine and reliable and it does not appear fabricated. However considering that there was allegation of commission of rape by an adult on a minor girl and particularly when the witness

spoke of the bedding and clothes spoiled with blood during the commission of the offence the corroboration from the medical evidence need to be insisted upon. In the above backdrop the absence of even minor injury to the internal and external genitals of the victim Km. Rachna has thus an adverse telling effect on the credibility of the evidence of both Km. Rachna and her sister Smt. Savitri and from the circumstances of the case and the evidence on record it was, in our opinion, legally difficult to come to the conclusion that Km. Rachna was subjected to sexual intercourse as alleged by the prosecution and as stated thereto by these witnesses.

16- The evidence of Km. Rachna and her sister Smt. Savitri may also be looked at by another angle. According to them the accused was occupying the same room with these two and their third sister in the night of the alleged occurrence. Km. Rachna stated that after the alleged performance of sexual intercourse on her accused asked her to give him milk. The witness then served hot milk to the accused and at that time according to her both her sisters Savitri and Kushum were then sleeping in the room. She claimed to have told them all about the incident of the night in the morning because after serving milk to the accused she went out to sleep in that night. In case the witness was subjected to rape in the manner as stated by her, the two other sisters would not have remained sleeping at that time in the same room and she herself would not have acted in such a normal way as to even serve milk to the accused and then to retire to sleep during that night and to tell all about the occurrence to her sisters in the morning. On a fair re-appreciation of the evidence of Km. Rachna we feel forced to infer that the evidence of the witness belie her claim about the commission of rape on her by the accused. Even otherwise it does not stand to reason that during that night the accused could have acted in such a manner while three sisters were occupying the same room and even otherwise after such an incident all the three sisters and the accused would have peacefully retired to sleep again and in the morning the accused would have left the house in a normal and routine manner to engage himself in his profession of rickshaw pulling as stated to by Smt. Savitri (P.W.4). Considering the evidence of this witness and the broad

features of the case also we find it difficult to agree with the view taken by the learned Sessions Judge that the evidence of both the sisters even in the absence of negative medical evidence was sufficient to prove the allegation of the prosecution.

17- The important question which arise for consideration is whether these sisters could have been put to such frame of mind as to make false allegation of sexual assault by the accused and particularly when the informant Smt. Savitri clearly admitted that accused used to love her and other sisters as his daughters; that the accused got her elder sisters Rekha and Rakhi married and that her engagement with her prospective husband was also arranged and ceremony performed by the accused.

18- It was recited in the F.I.R. that Smt. Chanda Devi, the mother of the informant had left her home uninformed about eight days before the incident of the case. The accused claimed that his wife developed illicit relations with Akhtar and with whom she had fled away from the house a week before 2-7-2001, the alleged date of the incident. Informant Smt. Savitri (P.W.4) despite having referred in the F.I.R. about her mother leaving the house in an undesirable manner gave out in her evidence that her mother had in fact gone to Rishikesh by disclosing the programme to her and that this fact was also disclosed by her in the F.I.R. lodged with the police. As stated above the F.I.R. recited otherwise indicating that informant's mother had fled away leaving the daughters and the husband, the accused of the case. It thus clearly appear that informant in her evidence made marked improvement with an attempt to show that her mother was not having a dubious character. The evidence however suggest otherwise and the inference also lent credence to by the contradictory stand taken by Km. Rachna (P.W.2) the alleged victim of the case. She stated that her mother had left for the house of in-laws of her sister Rakhi in district Saharanpur about 4-5 days before the occurrence of the case and thereafter her two other sisters and the accused were the only occupants of the house. She also stated that her mother had left for Saharanpur without letting her and others know about the programme to visit Saharanpur and that her mother gave this

information only on her return after about a week. She also claimed that her mother had gone to Saharanpur with Akhtar. From the evidence of both the sisters and the version of the F.I.R. it is thus evident that contradictory versions were made about the departure of Smt. Chanda Devi from her house uninformed and both the sisters have made futile attempt in their evidence to show that their mother left the house as per her programme known to the witnesses and that their mother was not a women of dubious character. In the face of such evidence and peculiar aspect of the case the suggestion of the defence as given to Smt. Savitri (P.W.4) that her mother had fled away uninformed with Akhtar and she had not gone to Rishikesh can very well be said to be carrying meaning and sufficient credibility to the claim made by the accused as referred above. In short it can safely be accepted that Smt. Chanda the wife of the accused being a women of dubious character left her house uninformed and also that the reason of her leaving the house was that she was soliciting the company of Akhtar of village Naugaon of district Saharanpur.

19- Informant Smt. Savitri also categorically stated that Akhtar did not want the accused continue to reside with her and other family members. She also gave out that in the morning of the alleged occurrence all about it was told to Smt. Sumitra a neighbour who in turn took the witness and her sister to one Sardarji who prepared writtend report at the instance of the witness. She also stated that Smt. Sumitra and Sardarji wanted that accused should not reside with her and other family members and they wanted that the accused should be made to leave the house. The scribe of the written report, Ext. Ka.5 who according to the witness was that Sardarji was not included in the list of the witnesses in the charge sheet, Ext. Ka.10 and perusal of the case dairy also indicate that for the reasons best known to the Investigating Officer the scribe was also not interrogated during the investigation. His name as a scribe was also not mentioned in the written report. The informant was suggested that false report was lodged against the accused on the asking of her mother, Akhtar and these neighbours and further that she gave false evidence about the alleged incident. Similar

suggestion was given to Km. Rachna. Both the sisters refuted the suggestion but in the totality of the circumstances of the case and the evidence on record it is abundantly clear that the mother of the witnesses having maintained some sort of alliance with Akhtar wanted to get rid of her husband the accused, similar to the wish of the neighbours named above and thus the suggestion given to the witnesses can very well be said to be carrying meaning and lending credence to the claim made by the accused. Therefore, the possibility can not be ruled out that on the instigation of all these persons the accused was falsely roped in by making such a serious allegation of rape against him. It also could not be lost sight of the fact that Smt. Chanda was a woman of dubious character and her daughters having not been brought up in a desired virtuous atmosphere, they could have been made to make such wild and serious false allegation against the accused. No doubt due to various psycho-social factors a girl or a woman in India would not normally level such false allegation of sexual assault but aberrations are always there in our society also and keeping in view the family atmosphere of the informant and the alleged victim, the evidence and the circumstances as emerged from the material on record forced us to come to the above conclusion. It will also not be out of place to mention that accused was arrested next day of the alleged occurrence from the locality of his residence and it was in the evidence of the informant that the accused went away in a routine manner to earn his livelihood as rickshaw-puller in the morning on 3-7-2001 and he was thus not shown to have been acting in any unscrupulous manner even on the day succeeding the night of the alleged occurrence. The circumstance made out from the conduct of the accused also run counter to the claim of the prosecution.

20- Learned Sessions Judge failed to take note of these important aspects of the matter in proper perspective and also failed to appraise the evidence of Km. Rachna and Smt. Savitri with care and caution resulting which an inference was drawn that both these sisters were reliable witnesses and that their evidence proved that the accused committed rape on the victim of the case.

21- Having re-appreciated the evidence in the light of the attending circumstances and factors we do not find ourselves in agreement with the view taken by the learned Sessions Judge and therefore we are convinced that the prosecution evidence was not sufficient enough to prove the guilt of the accused beyond any reasonable doubt. The accused, therefore, deserve to be extended benefit of doubt and to be acquitted of the charge levelled against him. In other words his appeal succeed and is fit to be allowed.

22- In view of above the appeal is allowed. The judgment dated 23-7-2002 is set aside and the accused Ali Jan is held not guilty and is acquitted of the charge under Section 376 I.P.C. He is in jail. He shall be released forth-with, if not wanted in connection with any other case.

23- Let the record be sent back to the trial court for compliance to be reported in two months.

(B.S.Verma, J.) **(Irshad Husssain, J.)**

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